IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No.

HENRY M. BAKER, PETITIONER,

vs.

HORACE S. CUMMINGS, RESPONDENT.

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Now comes Henry M. Baker, the petitioner above named, and respectfully prays for a writ of certiorari to the Court of Appeals of the District of Columbia requiring the above cause to be certified to this court for review and determination pursuant to act of Congress approved March 3, 1897 (29 Stats., 692), and represents:

1. That in the year 1874 petitioner and respondent formed a partnership under the firm name of Cummings & Baker for the conduct of business as attorneys in the prosecution of claims against the Government, which said partnership continued until September, 1889, when it was dissolved by

consent; that in the year 1889, shortly before the dissolution of the partnership, an account was stated between the petitioner and the respondent which showed an indebtedness on account of partnership matters due from the respondent to your petitioner amounting to $2,712.81; that thereafter, to wit, in December, 1889, after the dissolution of the partnership, petitioner instituted the action now presented for review in the supreme court of the District of Columbia, on its law side, to recover said sum, with interest from July 31, 1889. Thereafter, to wit, on February 1, 1890, before plea was due in said lawsuit, the respondent Cummings filed a bill in equity in said supreme court of the District of Columbia, wherein he alleged that among the items of business of the firm were cases known as "inspector cases;" that on September 6, 1886, the respondent had assigned to your petitioner in writing all his fees in such cases, and further alleged that said assignment was procured by fraudulent representations made by your petitioner. Said bill further alleged that this present lawsuit had been instituted; that all of the items mentioned in the particulars of demand annexed to your petitioner's declaration originated in and grew out of the partnership dealings of the partners, and that they did not constitute a full adjustment of the receipts of the members of said firm, and that only by a full, proper, and complete accounting and discovery could a proper adjustment be had of the rights and equities of the petitioner and respondent growing out of said partnership dealings. The bill further alleged that this action at law was not yet at issue, but that the time for pleading had nearly approached, and that the respondent Cummings could not, under the rules of pleading at law, incorporate in his plea the equitable defenses set forth in the bill, and which in a court of equity would prevail against your petitioner's demand, and especially that the respondent's right to have discovery and to have the assignment referred to canceled was not cognizable by a court

of law, and that if your petitioner, plaintiff in the present suit, should be permitted to prosecute the same against the respondent he would be deprived of his defenses, and that therefore he was entitled to have your petitioner enjoined from prosecuting this action at law. The bill therefore prayed for discovery, that the assignment referred to might be declared null and void, and that your petitioner might be enjoined from a further prosecution of this action, and that a complete accounting might be had in the equity court between your petitioner and the respondent in respect to the partnership dealings, and that your petitioner might be decreed to pay the respondent the amount found to be due him.

2. That in consequence of the filing of said bill for an injunction and accounting all proceedings in this action were suspended, and in the progress of said equity cause the supreme court of the District of Columbia held that your petitioner was indebted to the respondent in the sum of between thirty and forty thousand dollars, credit being allowed your petitioner in said accounting for the amount claimed in this action; that from the decree of the supreme court of the District of Columbia an appeal was prosecuted to the Court of Appeals of the District of Columbia, which affirmed the decree of the court below (8 App. D. C., 515). From the decree of the Court of Appeals of the District of Columbia affirming the decree of the supreme court of the District of Columbia an appeal was prosecuted to this court, which, on February 21, 1898 (169 U. S., 189), reversed the decree of the ~~supreme court~~ Court of Appeals of the District of Columbia and remanded the case, with instructions to set aside the decree of the supreme court of the District of Columbia and to remand the same to that court with instructions to dismiss the bill; that thereafter the Court of Appeals of the District of Columbia did remand the case to the Supreme Court of the District of Columbia, and that court thereafter, on the 18th

day of April, 1898, passed its final decree, pursuant to the mandate of this court, dismissing the bill of the respondent Cummings.

3. That on the 10th day of February, 1892, more than two years after the institution of said equity cause to restrain this action at law, and while said equity case was still pending, the respondent Cummings filed his pleas in this action, in which he sought to offset the amount of the plaintiff's claim and to recover from him an alleged indebtedness of $35,873 35, being the identical items set up and claimed in said equity cause; that nothing further was done in this action at law in consequence of the pendency of said equity cause until after the determination of the same by this court (169 U. S., 189), whereupon the cause proceeded to issue, your petitioner replying to the respondent's pleas of set-off, which claimed the identical sums for which he had obtained a decree in said equity cause, and which had been dismissed by this court, that the same were *adjudicata* by reason of the decree of this court.

4. Thereafter, the respondent admitting his indebtedness to your petitioner in the amount claimed in this action at law, the following stipulation was entered into between your petitioner and the respondent:

"It is hereby stipulated and agreed by and between the parties to this cause, by their respective attorneys, that this cause may be tried by the court without a jury, the parties hereby expressly waiving the same, upon the following agreed statement of facts, subject to the limitations herein contained.

"That on the 31st day of July, A. D. 1889, and for a long time prior thereto, the plaintiff and the defendant were copartners engaged as attorneys in the prosecution of claims against the United States, the net fees derived therefrom being under the contract of partnership equally to be divided between them, the said partners; that on the 19th day of December, A. D. 1889, the plaintiff instituted this

action to recover the sum of $2,712.81, with interest from the 31st day of July, A. D. 1889; that the said sum is the identical sum referred to on pages 227 and 248 of the record on appeal to the Supreme Court of the United States in the equity cause hereinafter referred to (pages 255 and 277 of the record herewith submitted); that after the institution of this suit the defendant herein instituted a certain equity proceeding against the plaintiff herein in the supreme court of the District of Columbia, the same being known and numbered on the docket of said court as equity cause No. 12263. The record, decrees, and opinions of the respective courts therein, both in this and the appellate courts, are hereby referred to and made part hereof; that the several items of account set forth in the pleas of set off herein are respectively the identical items set up, referred to, and claimed in said equity cause.

"If the court on inspection of said record and proceedings in said equity cause of the record and proceedings of this cause shall be of opinion that the defendant herein may not set up in bar of the plaintiff's action any of said items of set-off and counter-claim as pleaded in this action, but is concluded by the proceedings and decree in said equity cause, then this court may enter judgment for the plaintiff in this action for the sum of $2,712.81, with interest thereon from the 31st day of July, A. D. 1889, as claimed in his declaration herein; but if the court shall be of opinion that any of said items of set-off and counter-claim may be set up in bar of the plaintiff's action herein, then this cause shall be remanded to the docket for trial by jury. Both parties hereto reserve the right of appeal or by writ of error from the judgment of this court or of any court of review passing hereon, and also any other remedy which they may by law be entitled to."

5. That this action came on to be heard before Chief Justice Bingham, holding the supreme court of the District of Columbia, who, on March 27, 1899, being of opinion that the respondent Cummings was concluded as to all of the items embraced in his plea of set-off in this action by the decree of this court in the equity case, brought to restrain this action, rendered judgment in favor of your petitioner

against Cummings in accordance with the terms of the stipulation.

6. That from the judgment of said court in favor of your petitioner an appeal was prosecuted to the Court of Appeals of the District of Columbia, which said court on the 6th day of February, 1899, by a majority opinion (Justices Morris and Shepard), Chief Justice Alvey dissenting, reversed the judgment of the supreme court of the District of Columbia and held that the decree of this court in said equity cause did not conclude the respondent as to the several matters therein litigated, and that he has the right in this action to litigate anew and set up and claim again the identical sums for which he obtained a decree in said equity cause.

7. That in its opinion, delivered by Justice Shepard, as by reference thereto will appear (page 319 of record, herewith submitted), the court said:

"The sole question involved in this appeal is the sufficiency of the appellee's (your petitioner's) defense of former adjudication of that issue founded on the decree in the equity branch of the case. * * * The application of this general principle (*res adjudicata*) to the peculiar features of this case shown by this record, presents a question of *grave difficulty*, involving as it does also the *delicate task of defining the scope of a general decree entered in pursuance of a mandate of the Supreme Court of the United States.* * * * Notwithstanding the dismissal was ordered and entered without words of qualification, the appellant contends that the opinion of the Supreme Court may be resorted to for the ascertainment of the grounds and limitation of the scope of that decree. In this we concur. * * * It now remains to ascertain the question actually determined by the Supreme Court in the equity case of Baker *vs.* Cummings, 169 U. S., 189. Was that decision an adjudication of the merits of the case? * * * Notwithstanding then that the decree was unqualified in its terms and rendered under a

mandate of the Supreme Court of the United States, we are constrained to hold that it did not render the question in issue here *res adjudicata.*

"If we have erred, we have the satisfaction of knowing that the amount in controversy gives the appellee the right, without restriction, to obtain a review of our decision."

8. Your petitioner is advised that said justice assumed, inasmuch as the effect of the decision is to subject your petitioner to liability for more than thirty-five thousand dollars for the same amounts for which the respondent recovered a decree against him in said equity cause, that your petitioner has an unfettered right of appeal, but your petitioner is advised said court is in error in that respect.

9. Your petitioner represents that, as by reference to said opinion will appear, the entire controversy in this case arises over the construction and effect of an opinion and an unqualified decree of this court in said equity cause; that doubt exists as to the correct construction and effect thereof, two justices of the supreme court of the District of Columbia, as appears by reference to the appendix to the brief filed in the court below and herewith presented as part hereof, holding that the decision of this court is conclusive between the parties hereto, and that this view has been concurred in by Chief Justice Alvey, who dissented from the majority opinion of the Court of Appeals, thus presenting a case in which three judges have decided in favor of your petitioner's view of the opinion and decree of this court and two against it.

10. Your petitioner represents that by reference to the opinion of this court in said equity case (169 U. S., 189) it will appear that all of the matters involved in this suit were in that suit expressly and distinctly litigated, considered by the court, and decided; that the court had jurisdiction of the subject-matter, and that it took jurisdiction at the request of

the respondent, who voluntarily transferred to the equity branch of the court the settlement of partnership matters, and although this court in its opinion in said equity cause reviewed all of the testimony in the case and distinctly decided the very matters sought to be put in issue in this case, and although the decree dismissing the bill was a general decree, without words of qualification, nevertheless the majority of the Court of Appeals of the District of Columbia considered that because this court in the concluding portion of its opinion stated that it preferred to rest its decision upon the ground of laches, that the effect of the decree of this court was to decide the single question that the respondent had no right to file a bill to cancel the assignment, and that therefore he may in this suit again litigate the validity of said assignment, assail it on the ground of fraud, and recover from your petitioner in this action the identical amount for the identical items for which he recovered a decree in said equity cause; whereby and by reason thereof your petitioner is wholly deprived of any benefit whatever of the judgment of this court, rendered on final hearing in the case in which it had jurisdiction between the same parties and upon the same subject-matter, after more than eight years of litigation.

Your petitioner therefore respectfully prays that the writ of certiorari may issue to the Court of Appeals of the District of Columbia to bring this cause to this court for review and determination.

Notice of this application has been given to opposing counsel.

HENRY M. BAKER.

CLARENCE A. BRANDENBURG,
Counsel for Petitioner.

DISTRICT OF COLUMBIA, *ss*:

I, Henry M. Baker, do solemnly swear that I have read the foregoing petition by me subscribed, and that I know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

HENRY M. BAKER.

Subscribed and sworn to before me this 12th day of February, 1900.

FERDINAND SCHMIDT,
Notary Public.

[SEAL.]